



Oduodi & another v Ojwang & 2 others (Environmental and Land Originating Summons E030 of 2024) [2025] KEELC 5338 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5338 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E030 OF 2024**

**BN OLAO, J
JULY 17, 2025**

BETWEEN

BENEDICT OGOLA ODUODI 1ST APPLICANT

JOSEPH KICHAYA OGOLA 2ND APPLICANT

AND

JARED ONYAMO OJWANG 1ST RESPONDENT

KENNEDY OMONDI 2ND RESPONDENT

HONEST PETUS AJELA 3RD RESPONDENT

RULING

1. Benedict Ogola Oduodi And Joseph Kichaya Ogola (the 1st and 2nd Applicants respectively) have approached this Court vide their amended Originating Summons dated 27th October 2024 in which they have impleaded Jared Onyamo Ojwang, Kennedy Omondi And Honest Petus Ajela (the 1st, 2nd and 3rd Respondents respectively). They claim to have acquired a portion of land measuring 0.8 Hectares out of the land parcel NO Marach/Ebukhalalire/219 by way of adverse possession. They therefore seek a determination of the following questions:
 1. Whether the 1st Respondent was the registered proprietor of the land parcel NO Marach/Ebukhalalire/219.
 - 1A) Whether the 2nd and 3rd Respondents got registered as proprietors during the proceedings of this suit.
 2. Whether or not the Applicants' family has been in actual and continuous, notorious occupation and use of L.R Marachi/Ebukhalalire/219 for a period exceeding 12 years.



3. Whether Respondents occupy an adjacent parcel of land registered in the names of Thomas Ogola Oduori and known as L.R MarachI/Ebukhalalire/192.
 4. Whether or not the Respondents will be condemned to pay costs of this suit.
2. Arising out of the above determinations, the Applicants seek judgment against the Respondents in the following terms:
- a. A declaration that the Applicants and their family have acquired a portion of L.R MarachI/Ebukhalalire/192 measuring 4.8 Hectares by way of adverse possession.
 - b. The County Land Registrar to create an entry to effect (a) above.
 - c. Costs of the suit.

The Originating Summons is supported by the affidavit of the 1st Applicant dated 13th August as well as the further affidavit of the 2nd Applicant dated 27th October 2024.

3. The gist of the Originating Summons, as amended, is that the Applicants' father one Thomas Ogola Oduori was the registered proprietor of the land parcel NO Marach/Ebukhalalire/192 while the Respondents are the registered proprietors of the land parcel NO Marach/Ebukhalalire/219 (the suit land). That Applicant's father gifted the 1st Respondent's father the suit land and somewhere in July 2024, the Respondents sent a surveyor to survey the suit land for purposes of selling it to third parties hence this suit. In the course of these proceedings, the suit land was registered in the names of the 2nd and 3rd Respondents.
4. Annexed to the initial Originating Summons are the following documents:
1. Copy of the title deed to the land parcel NO Marach/Ebukhalalire/192 in the name of Thomas Ogola Oduori issued on 10th December 1979.
 2. Copy of certificate of search for the land parcel NO Marach/Ebukhalalire/219 showing that it was registered in the name of the 1st Respondent on 14th March 1985.
 3. Copy of certificate of search for the land parcel NO Marach/Ebukhalalire/192 in the name of Thomas Ogola Oduori.

By a further supporting affidavit dated 27th October 2024 and annexed to the Amended Originating Summons, the 2nd Applicant annexed the following:

1. A copy of certificate of search for the land parcel NO Marach/Ebukhalalire/219 in the name of the 2nd and 3rd Respondents.

The Respondents are yet to file any response to the initial or Amended Originating Summons as at the time of this ruling. However, they have filed a Preliminary Objection dated 3rd November 2024 raising the following issues:

1. The Court lacks jurisdiction to hear and determine this matter as it constitutes the Estate of a deceased person L.R Marach/Ebukhalalire/192.
2. The Application offends the provisions of Order 37 rule 7 of the Civil Procedure Rules 2010.
3. That no claim for adverse possession shall issue against and Estate of a deceased person.



4. The suit as instituted is fatally incompetent and incurably defective.
5. The suit before this Honourable Court amounts to an abuse of due process and the same ought to be struck out with costs.

That Preliminary Objection is the subject of this ruling.

5. The Preliminary Objection has been canvassed by way of written submissions. The same have been filed by Mr Ondago instructed by the firm of Sikuku Mwiti & Advocates Partners for the Respondents and by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Applicant.
6. I have considered the grounds of objections as well as the submissions by counsel.
7. A Preliminary Objection was defined by Law J.A in the case of Mukisa Biscuits Manufacturing Company Ltd -v- West End Distributors Ltd 1969 EA 697 as follows:

“So far as I am aware, Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued as a Preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, Sir Charles Newbold P added that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

This is the route which Courts have continued to follow with regard to Preliminary Objections. See also the Supreme Court’s decision in the case of Hassan Ali Joho & Another -v- Suleiman Said Shahbal & 2 Others 2014 Eklr [petition No 10 of 2013]. This case has also been followed in the cases of Hassan Nyanje Charo -v- Khatib Mwashetani & 3 Others Civil Application No 23 Of 2014 [2014 Eklr] As Well As In The Case Of Aviation & Allied Workers Union Kenya -v- Kenya Airways Ltd & 3 Others Civil Application No 50 of 2014 [2015 eKLR].

8. In the case of INdependent Electoral & Boundaries Commission -v- Cheperenger & 2 Others Civil Application No 36 of 2014 [2015 KESC 2 KLR], the Supreme Court went on to add that:

“The true Preliminary Objection serves two purposes of merit; firstly, it serves as a shield for the originator of the objection - against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

I shall be guided by the above precedents among others. From the onset, however, some of the issues raised in the Preliminary Objection are not really pure points of law.

9. The first issue is that this Court lacks jurisdiction to determine this dispute as it involves the land parcel NO MARCH/Ebukhalalire/192 which constitutes the estate of a deceased person. Jurisdiction is of



course a matter of law and therefore a proper Preliminary Objection. And it is now well settled that where a Court finds that it has no jurisdiction to determine a particular dispute, it must down its tools – Owners Of The Motor Vessel ‘lilian S’ -v- Caltex Oil (kenya) Ltd C.A. CIVIL APPEAL NO 50 of 1989 (1989 KLR). On this issue, the Respondents have made the following submission at paragraph 14:

“In the instant case, the plaintiffs who are sons of the registered proprietor of parcel number L.R Marach/Ebukhalalire/192 cannot claim adverse on the property of the deceased father since they had his permission to occupy the suit property. In this case, it is only the law of succession that should apply.”

The land which the Applicants’ claim is not, in my view, clearly identified. It is not clear from the amended Originating Summons whether what the Applicants are seeking in adverse possession is the land parcel NO Marach/Ebukhalalire/192 or 219. In paragraph 2 of their amended Originating Summons, the Applicants have identified the following issue as among those which call for determination by this Court:

2: “Whether or not the Applicants’ family has been in actual and continuous notorious occupation and use of L.R Marach/Ebukhalalire/219 for a period exceeding 12 years.”

And in paragraph (a), they seek the following orders:

a. “A declaration that the Applicants and their family have acquired portion of L.R Marach/Ebukhalalire/192 measuring 4.8 HA by way of adverse possession.”

From the above pleadings, it is not clear whether the Applicants are seeking to have acquired land parcel NO Marach/Ebukhalalire/192 or 219 by adverse possession. That is a matter which they will have to clarify before this suit goes to full trial. Similarly, whether or not the land they are claiming is part of the Estate of a deceased is a matter to be determined on the evidence. Those two issues are not, *stricto sensu*, pure issues of law although they are serious issues. They are therefore not proper Preliminary Objections to be raised at this point as is clear from the precedents above.

10. With regard to the Preliminary Objection that the suit offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules, the said provision reads:

- (1) “An application under Section 38 of the *Limitation of Actions Act* shall be made by originating summons.”
- (2) “The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”
- (3) “The Court shall direct on whom and in what manner the summons shall be served.”

In his submissions on this issue, counsel for the Respondents’ states that the certificate of title has not been annexed to the amended Originating Summons. He then goes on to make the following submission at paragraph 18:

“The defect in the Originating Summons strikes at the root of proprietorship of the suit land as provided for under Article 40 of *the Constitution* of Kenya 2010. So, the defect being a fundamental one cannot be cured under any circumstances. In Joseph Dennis Odondo -v- Meshack Juma Omollo & another [2019 eKLR], the issue before Court was whether the original summons was incurably defective for failure to annex an extract to title as mandatorily required by Order 37 Rule 7(2) of



the Civil Procedure Code (sic) cap 21 Laws of Kenya. Court held that the failure to attach the extract to the title rendered the suit incurably defective.”

I have looked at the said case which is a decision of my brother G.M.A. Ongondo J dated 18th September 2019 in which he struck out an Originating Summons for failure to annex the extract of title. In this case, however, the Applicants have annexed both the copy of the land certificate to the land parcel NO Marach/Ebukhalalire/192 registered in the name of Thomas Ogola Oduor as well as a copy of the Certificate of Search for the land parcel NO Marach/Ebukhalalire/219 registered in the name of the 1st Respondent on 14th March 1985 and thereafter, in the names of the 2nd and 3rd Respondents on a date which is not very clear in August 2014. The Certificate of Search for the land parcel NO Marach/Ebukhalalire/219 and which is annexed to the amended Originating Summons meets the requirement of Order 37 Rule 7 (2) of the Civil Procedure Rules in respect to a claim for land by way of adverse possession. This issue was considered by the Court of Appeal in the case of Johnson Kinyua - v- Simon Gitura Rumuri C.a. Civil Appeal No 265 of 2005 [2011 eKLR] where it held:

“On our part, we have weighed the submissions made on behalf of the parties. Concerning the effect of failure to annex an extract of the title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search Certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificates.”

The Court then went on to cite the provisions of Sections 36(2) and 37(2) of the repealed Registered Land Act which reads:

36(2) “Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto, and certified copies of any document or of the registry map or of any plan filed in the registry.”

37(2) “Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed until the contrary is proved.”

The Court then stated that:

“In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration, we think a search certificate meets the requirements of the relevant law.”

The land parcels NO Marach/Ebukhalalire/192 and 219 which are the subject matter in this suit are registered under the repealed Registered Land Act and the new Land Registration Act respectively. Sections 36(2) and 37(2) of the repealed Act are similar to Sections 34 and 35(1) of the new Land Registration Act and read:

34: “A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.”

35(1) “Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.”



It must be clear therefor that failure to annex a copy of the title to the land parcel NO Marach/Ebukhalalire/192 is not fatal to the Applicants claim and that a copy of the Certificate of Search is sufficient compliance with the provisions of Order 37 Rule 7 of the Civil Procedure Rules.

11. The Respondents have also raised in ground NO 3 of their Preliminary Objection that no claim for adverse possession can be raised against an Estate of a deceased person. As I have already stated above, it is not clear from the amended Originating Summons whether the Applicants' claim in adverse possession is in respect to the land parcel NO Marach/Ebukhalalire/192 which is registered in the name of Thomas Ogola Oduori who, as per the submissions of the Applicants counsel, is now deceased, or is in respect to the land parcel NO Marach/Ebukhalalire/219 which is registered in the name of the Respondents. Even if the Applicants' claim is in respect to land belonging to the Estate of the deceased Thomas Ogola Oduori, the law is settled that such a claim can be made in respect of the Estate of the deceased. In the case of *Karuntimi Raiji -v- M'makinya M'intunga* 2013 Eklr [c.a. Civil Appeal No 325 of 2009] [2013 KECA 514 KLR], the Court of Appeal held that a claim for land by way of adverse possession survives a deceased person in terms of Section 30(f) of the repealed Registered *Land Act* which is equivalent to the Section 28(h) of the new *Land Registration Act*.
12. That ground is therefore not well taken.
13. Finally, in grounds NO 4 and 5, the Respondents have pleaded that this suit is fatally incompetent and incurably defective and further, that it amounts to an abuse of the due process and should therefore be struck out with costs. I do not see what pure points of law have been raised in those grounds. The less said about them the better.
14. What is clear from all the above is that whereas there are some issues of concern in the manner in which the amended Originating Summons has been drafted, the Preliminary Objection herein must be dismissed as it does not raise pure points of law and even the objection relating to Order 37 Rule 7 of the Civil Procedure Rules is not well taken. The Preliminary Objection dated 3rd November 2024 must therefore be for dismissal.
15. The up-shot of all the above is that having considered the Preliminary Objection herein, this Court proceeds to issue the following disposal orders:
 1. The Preliminary Objection dated 3rd November 2024 is devoid of merit. It is accordingly dismissed.
 2. Costs to the Applicant.
 3. The Respondents are yet to file their responses to the Originating Summons. They should do so and also file and serve any supporting documents within 15 days of this ruling.
 4. The parties shall then appear before the Deputy Registrar for pre-trial directions on a date suitable to them to be taken in the Registry.
 5. After compliance, they can take a date for hearing which will be by way of viva voce evidence.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 17TH DAY OF JULY 2025.

BOAZ N. OLAO

JUDGE

17TH JULY 2025

